



IN THE
Supreme Court of the United States

October Term, 1979

No. 78-1413

RICHARD SIMS, d/b/a
Bicentennial Shop,
Petitioner,

v.

KIRO, INC.
Respondent.

**BRIEF IN OPPOSITION TO ISSUANCE
OF WRIT OF CERTIORARI**

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COUNTERSTATEMENT OF THE CASE

On January 2, 1976, at the beginning of the Bicentennial Year, defendant KIRO, a Seattle television station, during a regular news program, broadcast a brief news feature story on the beginning of the bicentennial celebration, expressing opinions critical of the merchandising of bicentennial souvenir items.

The news broadcast contained no identification of the petitioner, Mr. Sims, or his shop. Some pictures of merchandise taken in the shop with Mr. Sims' cooperation were shown as general background to the news commentary, but they had been edited to eliminate that which might identify him. Thus, Mr. Sims' only connection with the story

was that he sold bicentennial souvenir merchandise (as did many others) which was criticized in general terms in the story. The transcript of the news feature is set forth in full in the decision of the Washington Court of Appeals, Appendix B to the Petition on file herein.

Mr. Sims sued KIRO for defamation, and at the commencement of the trial and prior to the selection of a jury, defendant KIRO moved to dismiss, requesting the trial judge to review the material broadcast to determine whether Mr. Sims' case met requisite standards established under state law and under the First Amendment to the United States Constitution. A transcription of the news feature story and a copy of the videotape (exact reproductions of the material broadcast) were admitted as exhibits by stipulation of the parties.

After viewing the videotape so that consideration could be given to the meaning of words in light of the background pictures, the trial court judge considered the arguments and briefs of counsel (including offers of proof made by plaintiff's counsel) and ordered the case dismissed, because (1) the plaintiff had not been identified and (2) the statements were not defamatory, but rather were fair comment on a matter of public interest.

The Washington State Court of Appeals also reviewed the videotape of the television news broadcast and sustained the trial court's determination that, given the nature and content of the broadcast, the petitioner, Mr. Sims, "failed to submit a triable issue" as to his being identified, *Sims v. KIRO, Inc.*, 20 Wn. App. 229, 235, 580 P.2d 642, 646 (1978), and that, therefore, the cause had been properly dismissed. Other dispositive issues were not reached.

ARGUMENT FOR DENIAL OF WRIT OF CERTIORARI

Petitioner bases his request for writ of certiorari on the assertion that this case represents "a wrong result or unjust decision" in that petitioner was denied a full trial. Petition for Writ of Certiorari at 5. This assertion does not satisfy the requirements of 28 U.S.C.A. § 1257(3), which petitioner cites as the basis of jurisdiction, that he show where a "title, right, privilege or immunity is specially set up or claimed under the Constitution . . . or statutes . . . of . . . the United States." This assertion further does not establish a "federal question of substance not theretofore determined by this court" as required by Supreme Court Rule 19.

This Court will not review matters decided upon independent and adequate state law grounds. *Wilson v. Loew's, Inc.*, 355 U.S. 597, 78 S. Ct. 526, 2 L. Ed. 2d 519 (1958). The Washington State Supreme Court defined standards for recovery by a private person in a defamation action against a publisher or broadcaster in the case of *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 546 P.2d 81 (1976). They are:

- (a) Plaintiff must prove that the statements were capable of a defamatory meaning;
- (b) Plaintiff must prove that the statements were false;
- (c) Plaintiff must prove that the substance of the statements created a substantial danger to reputation which should have been apparent to defendant;
- (d) Plaintiff must prove that the statements were made of and concerning plaintiff;
- (e) Plaintiff must prove that the defendant knew or should have known of the falsity.

The trial court judge and the reviewing judges of the State Court of Appeals both considered the allegedly defamatory news broadcast in detail and found that it could not be a basis for recovery inasmuch as necessary elements of proof required by state law (*i.e.*, identification of plaintiff) could not in any way be satisfied by Mr. Sims. In each court, it was found unnecessary to consider all five elements, once one or two of them were found lacking. In fact, the petitioner can show none of them, and the absence of any one is fatal to his claim.

The procedure which was utilized by the trial court was proper. Because of the guarantees of the rights of free speech and free press contained in the First Amendment to the United States Constitution, this Court has held that when a defamation action is brought against a publisher (or broadcaster) it is proper for a judge (or judges) to make a threshold determination as to whether there is evidence to be presented on the basis of which a jury can find the essential elements of the case. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

DEFICIENCIES OF PETITION

The Petition for Writ of Certiorari on file herein does not comply with requirements of Supreme Court Rule 23. The "question presented" framed by the petitioner is whether in the dismissal of the case the petitioner was accorded "due process of law under the Fourteenth Amendment to the United States Constitution." Petition for Writ of Certiorari at 2. The petitioner makes no showing that the Fourteenth Amendment due process rights were cited and urged to the trial court and to the Court of Appeals of the

State of Washington as required by Supreme Court Rule 23(1)(f). *See also, Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

Further, the petitioner failed to supply a copy of the opinion delivered by the trial court judge, The Honorable Stanley C. Soderlund, so as to satisfy the requirement of Supreme Court Rule 23(1)(i). These omissions constitute "a sufficient reason for denying his petition." Supreme Court Rule 23(4).

CONCLUSION

The Petition for Writ of Certiorari should be denied. The petitioner's claims are deficient under state law as well as federal Constitutional law. No new federal question of substance is presented. The disposition by the courts of the State of Washington was proper.

Respectfully submitted,

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